

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

Frances Smiley,

Plaintiff,

v.

Case No. 10-10473

Commissioner of Social Security,

Hon. Sean F. Cox

Defendant.

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**ORDER ADOPTING REPORT AND RECOMMENDATION**

Plaintiff Frances Smiley (“Plaintiff”) filed this action under 42 U.S.C. § 405(g), challenging a final decision of Defendant Commissioner denying her application for Disability Insurance Benefits. The parties have filed cross-motions for summary judgment based on the administrative record, which were referred to Magistrate Judge Charles Binder pursuant to 28 U.S.C. § 636 for issuance of a report and recommendation.

On November 1, 2010, Magistrate Judge Binder issued his report and recommendation (“R&R”) wherein he recommends that the Court deny Plaintiff’s Motion for Summary Judgment and grant Defendant’s Motion for Summary Judgment.

Pursuant to FED. R. CIV. P. 72(b), a party objecting to the recommended disposition of a matter by a magistrate judge must file objections to the R&R. “The district judge to whom the case is assigned shall make a *de novo* determination upon the record, or after additional evidence, of any portion of the magistrate judge’s disposition to which specific written objection has been made.” *Id.*

On November 15, 2010, Plaintiff filed written objections to Magistrate Judge Binder’s R&R. The Government filed a written response to those objections on November 29, 2010.

Plaintiff objects to Magistrate Judge Binder's conclusion that substantial evidence supports the ALJ's decision that Plaintiff did not meet Listing 1.02. This same argument was presented to, and rejected by, Magistrate Judge Binder. In her objections, Plaintiff merely restates Plaintiff's condition prior to September 2005.

The magistrate judge thoroughly discussed the evidence presented in the administrative record. This evidence supports his recommendation that Plaintiff's condition does not satisfy the criteria of Listing 1.02. Moreover, although he does not specifically reference Listing 1.02B in his recommendation, Magistrate Judge Binder found substantial evidence that Plaintiff's condition does not satisfy Listing 1.02B.

The administrative record shows that Plaintiff has been able to cook, wash dishes, clean the house, go to the zoo, and play volleyball. (Tr. at 228). These activities were reported more recently than the reports of pain used to support Plaintiff's objections. These activities are not consistent with activities conducted by a person whose condition satisfies the criteria of Listing 1.02. It is also important to note that the magistrate judge emphasized the ALJ's finding that "Plaintiff's subjective complaints of pain were not fully credible." (R&R at 11). Plaintiff's objections are supported by examples of subjective complaints of pain, rather than by objective medical evidence.

This Court agrees with Magistrate Judge Binder's conclusion that, under the applicable substantial evidence standard, the ALJ's determination in this matter is well within the "zone of choice" accorded the administrative fact-finder.

Accordingly, IT IS ORDERED that Magistrate Judge Binder's November 1, 2010 R&R is ADOPTED and Plaintiff's Objections are OVERRULED.

IT IS FURTHER ORDERED that Plaintiff's Motion for Summary Judgment is DENIED

and that Defendant's Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED.

s/Sean F. Cox  
Sean F. Cox  
United States District Judge

Dated: December 29, 2010

I hereby certify that a copy of the foregoing document was served upon counsel of record on December 29, 2010, by electronic and/or ordinary mail.

s/Jennifer Hernandez  
Case Manager